

ESSAY

Quasi-Constitutional Change Without Intent—a Response to Richard Albert

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In response to Richard Albert's *Quasi-Constitutional Amendments*,
65 BUFF. L. REV. 739 (2017).

INTRODUCTION

Today, almost every country in the world has a written constitution that includes one or more procedures for formally changing its text.¹ Such “formal constitutional amendment procedures” are often considered very important, if not essential, elements of a modern constitutional democratic system.² Some people even seem to believe that, in constitutional democracies where constitutions are codified in a master constitutional text, formal constitutional amendment is the exclusive way in which constitutional norms change. For example, the United States Supreme Court once noted that “nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.”³

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1. See Comparative Constitutions Project, *Constitution Amendment Procedure*, CONSTITUTE (Sept. 30, 2017, 8:27 AM), <https://www.constituteproject.org/search?lang=en&key=amend>.

2. See, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 461 (1993); VENICE COMM'N, REPORT ON CONSTITUTIONAL AMENDMENT 3 (2009) [hereinafter *Venice Comm'n*].

3. *Ullman v. United States*, 350 U.S. 422, 428 (1955).

Formal constitutional amendment has indeed been an important route for constitutional reform. The German Basic Law, for example, has been amended approximately sixty-three times in the past sixty-eight years, and some of these amendments have facilitated major constitutional developments such as rearmament, emergency regulations, budgetary and financial policy reorganisations, reunification, and European integration.⁴ However, research in the emerging field of comparative constitutional change suggests that in reality, formal amendment is not the only—and in some systems, not even the most common—way in which constitutions change. Constitutions have also adjusted over time through alternative processes of change, both legal and non-legal.⁵

Actuated by this insight, it has become quite common in comparative constitutional scholarship over the past decade or so to distinguish between “formal constitutional amendment” and “informal constitutional change.”⁶ The concept of formal constitutional amendment usually refers to explicit alterations in the wording of a master constitutional text that have been engineered through the special amendment procedure typically included in such texts.⁷ The concept of informal constitutional change, by contrast, refers to change in the operation of existing constitutional norms that has come about without formal constitutional amendment—that is, through other “alternative” processes

4. See WERNER HEUN, *THE CONSTITUTION OF GERMANY: A CONTEXTUAL ANALYSIS* 9–23 (2011).

5. See generally *Venice Comm’n*, *supra* note 2, at 22; see STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO PRACTICE* 28 (1996); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 497–529 (2007).

6. See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT’L. J. CONST. L. 686, 688 (2015).

7. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 55 (2009).

of changing the constitution.⁸

One of the most challenging questions the phenomenon of informal constitutional change raises is how this phenomenon can be best understood.⁹ That is, how can we best describe and explain constitutional change that occurs outside formal amendment procedures? An additional question raised is how best to identify this type of constitutional change in the first place. These questions lie at the heart of constitutional theory and practice because they compel us to rethink our presuppositions about how the realms of constitutional law and politics relate to one another across time.¹⁰

A. *Albert's Basic Idea*

In a fascinating and helpful article, Richard Albert explores these questions by looking into what he refers to as “quasi-constitutional amendments.”¹¹ As Albert describes this phenomenon:

A quasi-constitutional amendment is a sub-constitutional alteration to the operation of a set of existing norms in the constitution. It is a change that does not possess the same legal status as a constitutional amendment, that is formally susceptible to statutory repeal or revision, but that may achieve the function, though not the formal status of constitutional law over time as a

8. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *DRAKE L. REV.* 925, 929 (2007); HEINRICH AMADEUS WOLFF, *UNGESCHRIEBENES VERFASSUNGSRECHT UNTER DEM GRUNDGESETZ* 99 (2000); Reijer Passchier, *Informal Constitutional Change: Constitutional Change Without Formal Constitutional Amendment in Comparative Perspective* (Sept. 28, 2017) (unpublished Ph.D. Dissertation, Leiden University) (on file with author).

9. The difficulty of this challenge is for example recognized by Elkins et al. and Hesse. See ELKINS ET AL., *supra* note 7, at 46; KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 15 (20th ed. 1995).

10. See MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 297–311 (2010); see generally CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 94–101 (Maurice Adams et al. eds., 2017).

11. Richard Albert, *Quasi-Constitutional Amendments*, 65 *BUFF. L. REV.* 739, 739–740 (2017).

result of its subject-matter and importance—making it just as durable as a constitutional amendment.¹²

Albert then suggests that, in identifying quasi-constitutional amendments, we should focus on what he believes to be their “one common point of origin.”¹³ As he writes:

As to their origins, quasi-constitutional amendments are the result of a self-conscious circumvention of onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution . . . Where constitutional actors determine, correctly or not, that the current political landscape would frustrate their plans for a constitutional amendment to entrench new policy preferences, they resort instead to sub-constitutional means—for instance, legislation or political practice—whose success requires less or perhaps even no cross-party and inter-institutional coordination.¹⁴

B. *My Response*

I fully agree with Albert that quasi-constitutional amendments—which I will consider a species of the broader phenomenon of informal constitutional change—exist and that it is imperative that we pay more attention to this type constitutional development. I also find Albert’s definition particularly helpful as it acknowledges changes in the working of a constitution may take place not only at particular “moments,”¹⁵ but also gradually and incrementally.¹⁶ As Heller already knew, “a power which, while for a time existing as a matter of brute fact, and though experienced as unjust, succeeds in winning for itself bit by bit the belief in its justification.”¹⁷ Albert’s definition of

12. *Id.* at 740.

13. *Id.* at 741.

14. *Id.* at 742.

15. For a discussion a theory of constitutional “moments,” see 1 BRUCE ACKERMAN, *WE THE PEOPLE* 6–7, 40–41, 266 (1993).

16. Albert, *supra* note 11, at 740.

17. Hermann Heller, *The Nature and Function of the State*, 18 CARDOZO L. REV. 1139, 1180 (1996).

quasi-constitutional amendments accounts for this often-neglected fact.

However, I also have a more skeptical set of comments on Albert's article which I will set out in this essay. To provide a preview: the central point I will make concerns Albert's insistence on quasi-constitutional amendments being the result of a "self-conscious" effort to circumvent "onerous rules of formal amendment in order to alter the operation of a set of existing norms in the constitution."¹⁸ As I will argue in this Essay, a truly comprehensive theory of quasi-constitutional amendments—or of informal constitutional change—is also able to account for constitutional change caused by facts not accompanied by a demonstrable intent or awareness of the change on the part of constitutional actors. Recognizing such change, which I will refer to as "silent constitutional change," has implications for the way we should describe processes of constitutional development and explain why constitutional change does not always come about through the "front door" of a formal constitutional amendment procedure.

C. Two Preliminary Remarks

Before I start, I would like to make two remarks about the phrase "quasi-constitutional amendments." First, I like the prefix "quasi," because it appreciates the fact that changes in non-constitutional form can have profound implications for the operation of existing constitutional norms (indeed, almost as profound as the 'real' thing, which is a formal constitutional amendment), but also that such changes cannot, in principle, perfectly substitute formal constitutional amendments. Indeed, it is important to account for the more or less obvious, yet sometimes neglected, fact that processes taking place outside of a formal constitutional amendment procedure can profoundly change the operation of a constitution, but not its text.¹⁹ This implies

18. Albert, *supra* note 11, at 741–42.

19. See Brannon P. Denning & John R. Vile, *The Relevance of Constitutional*

that, however consequential informal processes can be for the working of constitutional texts, we should anticipate that in any given master-text constitutional democracy it is possible that some “hard-wired” constitutional issues can change only through formal constitutional amendment.²⁰ Moreover, the fact that informal processes of change cannot affect the literal wording of the constitutional text entails that it is wise for students of constitutional development to presuppose that the changes these processes have produced might not always be capable of perfectly substituting formal constitutional amendments in being the final arbiter of disputes and controversies that may arise in the course of constitutional development.²¹ As Gerken puts it, “[i]f amendment takes place informally and is not embodied in an agreed-upon textual reference, how do we figure out the difference between an enduring shift in constitutional meaning and the product of ordinary politics?”²²

However, I object to use of the word “amendment” in the phrase “quasi-constitutional amendments.”²³ In many jurisdictions, the word “amendment” has a very specific meaning—its use is reserved for textual modifications of legislation, both ordinary and constitutional. For example, the United States Constitution was amended for the last time in 1992, when the constitutional legislator brought about the twenty-seventh textual addition to the 1789 constitutional document.²⁴ The word “change” commonly has a broader meaning—it can be used to refer to alterations in the operation of existing norms in legislation regardless of

Amendments: A Response to David Strauss, 77 TUL. L. REV. 247, 248 (2002).

20. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 29 (2006); Wim J.M. Voermans, *Constitutional Reserves and Covert Constitutions*, 3 INDIAN J. CONST. L. 84, 84 (2009).

21. WILLIAM S. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE 14 (1956).

22. Gerken, *supra* note 8, at 937–38.

23. I thank my colleague Eva van Vugt for suggesting this point.

24. U.S. CONST. amend XXVII.

the form in which these alterations have come about. I will therefore use the phrase “quasi-constitutional *change*” instead of the phrase “quasi-constitutional *amendment*” to refer to sub-constitutional alterations to the operation of existing constitutional norms.

At the outset, I stress that my response to Albert’s article should serve to caution us that when we benefit from Albert’s ideas to make sense of constitutional change, we should keep in the back of our minds that the perspective Albert takes does not provide a comprehensive view on constitutional change and that at least one powerful alternative perspective is indeed available. Albert’s analysis of issues regarding constitutional change is razor-sharp and the concepts he develops are very helpful, especially for comparative purposes. Moreover, Albert’s ideas shed new light on classical problems of constitutionalism and their implications deserve sustained scholarly attention.

I. SILENT CONSTITUTIONAL CHANGE

As we have seen, in Albert’s view, the origins of quasi-constitutional change lie in a *self-conscious effort* of constitutional actors to *circumvent* rules of formal constitutional amendment in order to alter the operation of a set of existing norms in the constitution.²⁵ Taking this perspective on constitutional change has at least one major advantage: it allows us to appreciate important methods of changing the constitution outside the conventional canon of formal constitutional amendments and “landmark” judicial decisions while more or less maintaining a relatively ordered worldview in which a nation’s constitution is seen as a closed legal system whose development is controlled by the community of constitutional actors that lives within it.²⁶ The

25. Albert, *supra* note 11, at 741–42.

26. See Christoph Möllers, *Pouvoir Constituant-Constitution-Constitutionalisation in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 183, 187–88 (Armin von Bogdandy & Jürgen Bast eds., 2006).

main problem of quasi-constitutional change is that, according to Albert, it complicates “our understanding of how a constitution is made, what it is, and where to find it.”²⁷ However, if we limit ourselves, as Albert does, to recognizing change that is engineered intentionally by constitutional actors, we should be able to account for some alternative constitutional law-making paths that are currently underappreciated and, at the same time, preserve a relatively clear epistemological and methodological distinction between the normative “ought” of constitutional law—whether purposefully changed by constitutional actors or not—and describing the empirical “is” of socio-political development.²⁸

On the other hand, the approach Albert takes is not without its limitations. Most importantly, due to its “residual legal positivism”²⁹—as Loughlin would presumably refer to Albert’s attempt to save the autonomy and specific normativity of constitutional law—Albert’s approach does not enable us to account for informal or quasi-constitutional change whose causes cannot be traced to self-conscious efforts to evade hard-to-pass formal constitutional amendment routes. I call the phenomenon to which I am alluding silent constitutional change.³⁰ Silent constitutional change is an alteration in the operation of existing constitutional norms that takes place without foregoing formal constitutional amendment, and is caused by facts that

27. Albert, *supra* note 11, at 765.

28. For defenses of a “strict” distinction between “is” and “ought,” see Hans Kelsen, *On the Border Between Legal and Sociological Method*, in WEIMAR: A JURISPRUDENCE OF CRISIS 57, 58 (Arthur J. Jacobson & Bernard Schlink eds., 2000); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 146–147 (Sanford Levinson ed., 1995); Ernst Wolfgang Böckenförde, *Anmerkungen zum Begriff Verfassungswandel*, in WEGE UND VERFAHREN DES VERFASSUNGSLEBENS 6, 6 (Peter Badura et al. eds., 1993).

29. LOUGHLIN, *supra* note 10, at 303.

30. This phrase references the German term “*stiller Verfassungswandel*.” See e.g. HEUN, *supra* note 4, at 21; Möllers, *supra* note 26, at 190.

are not accompanied by a demonstrable intention or awareness of the change on the part of constitutional actors.³¹ Indeed, the “classic” German constitutionalist Georg Jellinek already noted that a theory of constitutional change which incorporates silent constitutional change is much more interesting than one which only appreciates change that comes about through purposeful acts of will.³²

We can distinguish between at least two types of silent constitutional change theories. Informal and quasi-constitutional change should arguably be capable of accounting for: 1) silent constitutional change that occurs—more or less—within the control of constitutional actors; and 2) silent constitutional change that occurs outside of these actors’ control. I hasten to add, however, that this typology serves an explanatory purpose. “Controlled” and “uncontrolled” silent constitutional change may not occur in their pure form in the real world. Moreover, as we shall see, the two categories may overlap: change that was initially inside the scope of control of constitutional actors may, over time, get out of hand.

A. *Controlled Change*

Consider first the possibility of silent constitutional change occurring within the control of constitutional actors. In this scenario, constitutional change is triggered by acts of constitutional actors without these actors univocally revealing—or explicitly acknowledging—an intention to bypass formal constitutional amendment hurdles in order to alter the operation of existing constitutional norms. Even where we have ample reason to suspect constitutional actors of deliberately trying to circumvent such hurdles, these

31. GEORG JELLINEK, VERFASSUNGSÄNDERUNG UND VERFASSUNGSWANDLUNG 3 (1906) [hereinafter *Verfassungsänderung*], translated in Georg Jellinek, *Constitutional Amendment and Constitutional Transformation*, in Jacobson & Schlink, *supra* note 28, at 54–57.

32. *Verfassungsänderung*, *supra* note 31, at 3.

actors may not always admit—or indeed, even deny—that they have an objective to change the constitution or that they think that *constitutional* change is going on. As Wolff reminds us, informal constitutional change does not necessarily bear the character of open renewal; it may well come about without a clear separation being made between what has hitherto been said, and what now applies.³³ Additionally, the results of efforts to change constitutional norms outside cumbersome processes of new constitutional writing are occasionally claimed to be timelessly correct.³⁴

An example of the type of silent constitutional development imagined here can arguably be found in American constitutionalism. The United States Constitution vests in Congress the power to “declare war” and it makes the president the “Commander in Chief” of the Armed Forces.³⁵ Regardless of their exact original meaning (which is contested), these provisions have made sure that, roughly up and until the Second World War, the ability of presidents to use military force depended to a great extent on congressional consent.³⁶ In short, the clause permitting Congress to declare war protected a prerogative for Congress to authorize and regulate the use of military force. The Commander-in-Chief clause protected nothing more—and nothing less—than a presidential prerogative to superintend the military; that is, to execute the use of force in accordance with the wishes of Congress.³⁷

However, during the Cold War and the War on Terror, a development occurred whereby the president, as

33. WOLFF, *supra* note 8, at 99.

34. *Id.*

35. See U.S. CONST. art I § 8; *Id.* art. II, § 2.

36. Stephen M. Griffin, *The Executive Power*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 343, 351–53 (Mark Tushnet et al., eds. 2015).

37. Michael Stokes Paulsen, *The War Power*, 33 HARV. J. L. SOC. POL’Y 113, 115–16, 124–26 (2010); David J. Barron & Martin S. Lederman, *The Commander In Chief at The Lowest Ebb: Framing The Problem, Doctrine, And Original Understanding*, 121 HARV. L. REV. 691, 767–800 (2008).

Commander-in-Chief, acquired an ever more powerful and independent position in the field of national security.³⁸ Although this development deviates significantly from the traditional pre-WWII understanding of the division of constitutional war powers, the judiciary has hardly interfered; it has consistently refused to hear the merits in cases concerning the allocation and use of war powers.³⁹ The result is that a contemporary American president, as Commander-in-Chief, can hardly be controlled by Congress. As a practical matter at least, a contemporary president has a broad, preclusive, and unilateral authority to deploy conventional weapons and intelligence units, and use nuclear arms.⁴⁰

An important, if not the primary, driver of this development has been successive post-WWII presidents asserting autonomous power to commence and wage large-scale military conflicts.⁴¹ However, in asserting such a power, presidents hardly, if ever, explicitly acknowledged that they had an intention to change the operation of the U.S. constitutional war clauses or show an awareness that their moves had profound constitutional implications. They simply claim that their broad claims to the war powers were in accordance with the plan of the U.S. Constitution as it always had been interpreted and, hence, that their claims did not amount to constitutional change at all.

Take, for example, the moves President Truman made before and during the Korean War. When Truman deployed troops in Korea in 1950, he became the first president to commence a large-scale military conflict without

38. See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 1 (2013); Barron & Lederman, *supra* note 37, at 944–45.

39. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 302 (3d ed. 2013).

40. Paulsen, *supra* note 37, at 122; Barron & Lederman, *supra* note 37, at 1056–58.

41. Barron & Lederman, *supra* note 37, at 1055–58.

congressional approval.⁴² When confronted with critique from Congress, Truman boldly claimed—without reference to the existing division of constitutional war powers—that “[u]nder the President’s constitutional powers as Commander in Chief of the Armed Forces he has the authority to send troops anywhere in the world. That power has been recognized repeatedly by the Congress and the courts.”⁴³ Truman may or may not have intended to change the U.S. Constitution’s scheme for war. He may or may not have been aware of the constitutional consequences his actions could have; but, in any case, he created a precedent which would have profound and durable implications for the way the U.S. Constitution’s war clauses would operate in the decades to follow.⁴⁴

Indeed, other post-WWII presidents have followed Truman’s lead. When, after the Vietnam War, Congress adopted the War Powers Resolution (WPR),⁴⁵ which can be understood as an effort to re-circumscribe the president’s Commander-in-Chief powers,⁴⁶ Nixon argued that the WPR was “CLEARLY UNCONSTITUTIONAL” [*sic*], because it was an “attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.”⁴⁷ Here, a president explicitly denied the existence of an incongruence between the way the U.S. Constitution’s war clauses had operated traditionally, and the way things had evolved in the decades

42. *Id.*, at 1055. GRIFFIN, *supra* note 5, at 32.

43. The President’s News Conference of January 11, 1951, 1951 PUB. PAPERS 17, 19, <http://www.presidency.ucsb.edu/ws/?pid=14050>.

44. GRIFFIN, *supra* note 38, at 3–4; MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 18, 92 (2013); Barron & Lederman, *supra* note 37, at 1055–56.

45. War Powers Resolution of 1973, Pub. L. No. 93–148, 87 Stat. 555 (1973).

46. See *id.* § 2.

47. Veto of the War Powers Resolution, 1973 PUB. PAPERS 893, 893 (OCT. 24, 1973), <http://www.presidency.ucsb.edu/ws/?pid=4021>.

after the Second World War.⁴⁸ Nixon even added a little extra by claiming that it was Congress that sought to alter the constitution by the use of improper means.⁴⁹ Saliently, to his veto of the WPR, he added that the “only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.”⁵⁰

Of course, it is possible that Nixon was not really aware of the fact that his moves could trigger further constitutional change, or at least make the informal (or quasi-) constitutional changes that already occurred more durable, although his statements do not reveal such a consciousness. As for the question of whether constitutional change occurred, it does not really matter what Nixon thought and knew. Accompanied or not by an intention or awareness of constitutional change, the consequences of Nixon’s moves for the operation of the U.S. Constitution would be profound and more or less permanent.⁵¹

B. *Uncontrolled Change*

Turn now to the possibility of sub-constitutional developments affecting the operation of existing constitutional norms lying beyond the direct control of constitutional actors. When constitutional actors engineer certain non-constitutional changes, they may not always be aware that what they are doing may actually have constitutional consequences. Furthermore, an action that seems merely “ordinary” at the time it occurs may significantly alter the operation of existing constitutional norms in the future. As Fusaro and Oliver remind us,

48. *Id.*

49. *Id.*

50. *Id.*

51. FISHER, *supra* note 39, at 144–45; Barron & Lederman, *supra* note 37, at 1064–1112.

constitutional changes are not necessarily “the product of the will of the legitimate authorities in the pursuit of a relatively transparent institutional strategy.”⁵² Additionally, the operation of constitutional norms may change as a consequence of “evolutionary” or “contextual” forces; that is, legal or non-legal forces not unleashed by constitutional actors at all.⁵³ After all, constitutions do not operate in a vacuum, but they are, as Jellinek puts it, by inescapable necessity placed in the flow of historic events.⁵⁴

One example of this type of silent constitutional change can be found in the constitutional orders of Member States of the European Union (EU). Especially in the founding Member States of the EU,⁵⁵ the evolution of European integration has caused profound and durable change in the operation of national constitutional norms that has not been accompanied, at least not initially, by an intention or awareness of such change on the part of national constitutional actors.⁵⁶ Remember that back in the 1950’s and 1960’s, the European Community (the predecessor of the contemporary EU),⁵⁷ was created by an “ordinary”

52. Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 405, 407 (Dawn Oliver & Carlo Fusaro eds., 2011).

53. *Id.*; REINHOLD ZIPPELIUS & THOMAS WÜRTENBERGER, *DEUTSCHES STAATSRRECHT* 64 (31st ed., 2005).

54. JELLINEK, *supra* note 31, at 2.

55. Of course, states that entered the Union later were indeed aware of at least some of the constitutional consequences their membership would have, depending on their moment of entry.

56. Depending on whether or not one recognizes the supremacy of EU law above national constitutional law, this is an example either of *sub-constitutional* change in the operation of existing constitutional norms, and hence “quasi-constitutional change”, as defined by Albert, or *supra-constitutional* change in the operation of existing constitutional norms, a phenomenon which we may understand as yet another species of the broader phenomenon of informal constitutional change.

57. In this part, I use the term “European Union” to refer to the current Union as well as the various Communities that have preceded this organization. This approach is consistent with Article 1(3) of the Treaty of the European Union,

international treaty—just as were other international organizations.⁵⁸ National constitutional actors who ratified this treaty neither meant to alter the operation of their national constitution, nor fathomed what kind of constitutional consequences their actions would have in time.⁵⁹ Nevertheless, European legal scholars soon recognized that the development of the ratification of this treaty set in motion implied substantial “material” modifications to the contents of national constitutions.⁶⁰

The basis of this effect was laid down by a power barely controlled by national constitutional actors: the Court of Justice of the European Union (CJEU). In its famous 1964 decision *Costa V. ENEL*, this court held that that EU laws enjoy supremacy over national law, including national constitutional law,⁶¹ and that citizens may invoke this supremacy before the national courts of the Member States.⁶² The court reasoned that “[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system, which on the entry into force of the Treaty, became an integral part of the legal systems of the Member States, and one that their courts are bound to apply.”⁶³

As a consequence, national constitutional norms would no longer be applicable if they conflicted with EU law, and in

which states that “The Union shall replace and succeed the European EU.” ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW* lxvi (2016).

58. Treaty instituting the European Coal and Steel Community No. 3729, Apr. 18, 1951, 261 U.N.T.S. 140, 140–51.

59. Dieter S. Grimm, *The Basic Law at 60 – Identity and Change*, 11 GER. L. J. 33, 44 (2010).

60. Ignolf Pernice, *Constitutional Law Implications for a State Participating in a Process of Regional Integration, German Constitution and “Multilevel Constitutionalism,”* GER. REPORTS PUB. L. 40, 42 (1998).

61. The court explicitly confirmed this in Case 106/77, *Amministrazione delle Finanze v. Simmenthal S.p.A.*, 1978 E.C.R. 629.

62. Case C-6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585, 593–94.

63. *Id.* at 593.

case of doubt, national constitutional norms had to be interpreted in light of EU legislation.⁶⁴ National constitutions remained relevant insofar as they addressed subjects not regulated at the European level.⁶⁵ As the scope of EU law would gradually widen, national constitutional norms lost importance.⁶⁶

True, after the first steps were made, subsequent progress in European integration was achieved partly by self-conscious (sub-constitutional) acts on the part of national constitutional actors. Concluding and ratifying new treaties are one example. In that sense, informal constitutional change by European integration has, at least partly, deliberately been affected, and indeed controlled, by national constitutional actors. On the other hand, perhaps the greater part of progress in the evolution of European integration has been achieved at the European level itself. For example, through the decisions of the CJEU,⁶⁷ the enactment of secondary European law,⁶⁸ and through the formation of constitutional conventions.⁶⁹ These changes may or may not have been effected self-consciously by EU legal actors; national constitutional actors were often not involved.⁷⁰ As Woelk explains, with reference to the German context, although national constitutional actors appeared initially to maintain at least some control over change taking

64. HARMUT MAURER, STAATSRECHT I 128 (5th ed. 2007).

65. Grimm, *supra* note 59, at 45.

66. *Id.*

67. DEIRDRE CURTIN, EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES AND THE LIVING CONSTITUTION 179 (2009).

68. Grimm, *supra* note 59, at 45.

69. See generally Thomas Beukers, Law, Practice and Convention in the Constitution of the European Union 2011 (PhD Thesis, University of Amsterdam (on file with the Library of the University of Amsterdam)); see CURTIN, *supra* note 67, at 278; accord Isabella Eiselt & Peter Slominski, *Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU*, 12 EUR. L. J. 209, 209–225 (2006).

70. Voermans, *supra* note 20, at 97–103.

place at the European level, the “incremental” evolution of European integration in quantitative and qualitative terms soon raised the problem of what he refers to as “silent constitutional revision.”⁷¹

Consider the following examples of how the evolution of European integration has affected national constitutional norms silently.⁷² First, the evolution of European integration has effectively compelled national courts to increasingly function as EU courts as well. Indeed, it is the classic constitutional task of national courts to interpret and apply national and international law in accordance with the national constitution.⁷³ However, in *Simmenthal*, the CJEU clearly stated that in the EU, “every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”⁷⁴

Moreover, the evolution of EU integration has also significantly changed the powers and role of national parliaments.⁷⁵ Following the Single European Act of 1987, which allowed a majority vote in some European legislative areas, this process increasingly reduced the ability of national parliaments to make legislation unilaterally.⁷⁶ The

71. Jens Woelk, *Germany*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 143, 161 (Dawn Oliver & Carlo Fusaro eds., 2011).

72. For additional examples, see Pernice, *supra* note 60; Ingolf Pernice, *The Treaty of Lisbon Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 349–407 (2009).

73. See [GG] [BASIC LAW] arts. 92–104, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf.

74. Case 106/77, *Amministrazione delle Finanze v. Simmenthal S.p.A.*, 1978 E.C.R. 629, 644.

75. See DIETER S. GRIMM, *DIE ZUKUNFT DER VERFASSUNG II: AUSWIRKUNGEN VON EUROPÄISIERUNG UND GLOBALISIERUNG II* 107 (2012); HEUN, *supra* note 4, at 117.

76. Grimm, *supra* note 59, at 45.

wider the scope of EU law becomes, the less room remains for the national parliaments to make their decisions independently. Pernice argues that, as far as the transposition of EU directives is concerned, the role of national parliaments has become one of “rubber-stamping the ideas from Brussels and acting as an administrative agency rather than a political body.”⁷⁷

In summary, it appears that important quasi- and other informal constitutional changes in some constitutional democracies have taken place without a demonstrable intention or awareness of the change on the part of constitutional actors. Albert’s perspective on quasi-constitutional change does not enable us to account for this type of constitutional development. By holding on to the legal-positivist idea that constitutional change is something that, by definition, originates in “self-conscious” efforts of constitutional actors,⁷⁸ Albert neglects the fact that where constitutional actors, deliberately or otherwise, do not explicitly acknowledge or deny that their moves have called into question the meaning of existing constitutional norms, these moves can nevertheless have profound and durable constitutional consequences. Moreover, Albert’s perspective disregards the possibility of constitutional change being the effect of historical developments outside the direct control of constitutional actors.

Albert suggests that the idea of quasi-constitutional change complicates our understanding of how constitutions are made.⁷⁹ Conversely, I would assert that if we maintain that constitutions are always “made,” that is, that they are necessarily the product of a purposeful act of will, we cannot accurately understand how informal constitutional change takes place and how we can best identify it.

77. Pernice, *supra* note 60, at 59.

78. Albert, *supra* note 11, at 741.

79. *Id.* at 765.

II. A HISTORICAL-INSTITUTIONALISM VIEW

My critique on Albert's approach to quasi-constitutional change raises the following question: how instead should we describe and explain the processes of informal constitutional change, including quasi-constitutional change? I would suggest adopting what Hirschl has coined a "historical-institutionalism" view.⁸⁰ The way I see it, this cross-disciplinary view draws upon the proposition that, in generating meaning, constitutional norms and the institutional context in which these norms are embedded are interconnected through time.⁸¹ In other words, the historical-institutionalism perspective rests upon the idea that a nation's constitutional norms and the actual stable, valued, and recurring practices and understandings of its leading constitutional authorities,⁸² form a single system—a "constitutional order"⁸³—that is composed of the dynamic interplay between the "ought" of legal norms embodied by the constitution and the "is" of institutional reality that forms the context in which these norms operate.

On one hand, the historical-institutionalism view relies on the claim that the operation of existing constitutional norms may have a certain firmness of authority—that is, the fact that they are written may shield them to a certain extent from evolving constantly as their context evolves. On the other hand, the historical-institutionalism view presupposes that evolving institutional understandings and practices—

80. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 158 (2014).

81. See WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* xiii (1993); LOUGHLIN, *supra* note 10, at 310–11.

82. Which I understand as the major, permanent, empirical centers from which constitutional authority is being exerted—such as the executive, legislator, judiciary and public. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 333 (2012); JOHANNES VAN DER HOEVEN, *DE PLAATS VAN DE GRONDWET IN HET CONSTITUTIONELE RECHT* 32 (1958).

83. MURPHY, *supra* note 5, at 13.

whatever legal or non-legal form they take (and whether or not they are consciously engineered by constitutional actors)—may also have normative implications for the operation of existing constitutional norms. Thus, in contrast to Albert's more harmonious view on the "marriage" between law and politics, I suggest to understand constitutional change, in accordance with the historical institutionalism view, as the result of a "tension,"⁸⁴ or indeed "conflict,"⁸⁵ or "disharmony,"⁸⁶ between constitutional norms and an institutional reality that has become incongruent with these norms.

The following question remains: if we accept that informal constitutional change, including quasi-constitutional change, can also take place outside the will and awareness of constitutional actors, how we can identify such change? Focusing on self-conscious efforts to circumvent onerous formal constitutional amendment rules will, at the most, provide us a partial account of a nation's constitutional development. I would, therefore, suggest identifying informal constitutional change by focusing on the historical development of the "institutional constitution"—the norms embodied by a nation's master constitutional text in relation to the institutional context in which these norms are embedded.⁸⁷ In my view, identifying constitutional change then becomes a matter of studying changes in practices and understandings of leading constitutional authorities in relation to existing constitutional norms and see, partly by analogy with detecting the formation of constitutional conventions,⁸⁸ whether these changes have:

84. See LOUGHLIN, *supra* note 10, at 232.

85. Stephen M. Griffin, *Understanding Informal Constitutional Change*, 19 (Tulane Univ. Sch. Of Law Pub. Law & Legal Theory Research Paper No. 16-1., January 2016), <https://ssrn.com/abstract=2724580>.

86. See GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 1–33 (2009).

87. See AMAR, *supra* note 82, at 335.

88. See NICK W. BARBER, THE CONSTITUTIONAL STATE 83 (Martin Loughlin et al. eds., 2010).

(1) concerned subjects addressed by the constitution; (2) been persistent, that is, had staying power; (3) become standards regarded binding by those whom they concern; and (4) been accepted—implicitly or explicitly—as valid by a proportion at least of the constitutional community.

Admittedly, my focus on historical interplay between the interconnected realms of constitutional law and political institutions only allows us to identify constitutional change in retrospect. Here, as the great German philosopher G.W.F. Hegel put it, “[t]he owl of Minerva spreads its wings only with the falling of the dusk.”⁸⁹ At the same time, however, it appears that only a historical view can enable us to provide accurate descriptions of how constitutional change takes place and why it takes, or does not take, certain forms. Furthermore, the historical-institutionalism perspective I propose has at least one major advantage over Albert’s ‘broad’ legal-positivism approach: it allows us to also account for sources of changing the constitution unaccompanied by a demonstrable intent or awareness by constitutional actors of change. Furthermore, this perspective maintains the idea that constitutional law can have a special normativity—that is, a certain firmness of authority and impact on how things evolve in the real-world.

CONCLUSION

In this essay, I highlighted the value of Albert’s concept of quasi-constitutional amendments and argued that his approach has at least one important limitation: it only enables us to account for one—and perhaps not even the most important—type of informal constitutional change. Albert suggests that we should identify informal constitutional change by focusing on self-conscious efforts of constitutional actors to circumvent the formal rules of

89. GEORG W.F. HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* 28 (4th ed., 1995).

changing the constitution.⁹⁰ I have argued, instead, that in identifying informal constitutional change we should focus on the interplay between existing constitutional norms and institutional understandings and practices that form the context of these norms. In that way, we may be able to also account for the important phenomenon of “silent” informal constitutional change—that is, constitutional change that takes place without new writing and without a provable awareness or intention on the part of constitutional actors that *constitutional* change is going on.

The insights that constitutional change is not always self-consciously “brought about,” or even accompanied, by an awareness of change has important consequences for how research in the field of comparative constitutional change should be conducted. In this Essay, I have suggested some ideas with regard to how we should identify constitutional change. However, accepting that the import of constitutional norms may change in unanticipated ways, or even outside constitutional actors’ control, also has implications for the way we should explore why constitutional developments which do not always show on the face of the master constitutional text. To suggest one hypothesis, this may not only be a consequence of difficult formal constitutional law-making tracks, as Albert suggests,⁹¹ but also for example with an unwillingness on the part of the constitutional legislator to update the constitutional text when constitutional change has already taken place in some other form.

Moreover, recognizing that in the “marriage,” as Albert calls it,⁹² between constitutional law and politics, law may be less influential, arguably incurring consequences for the way we should evaluate the implications of informal constitutional change. Of course, constitutional change that

90. Albert, *supra* note 11, at 141–42.

91. *Id.* at 739.

92. *Id.*

occurs outside of formal constitutional amendment procedures might ultimately undermine the integrity of the master constitutional document, as Albert suggests.⁹³ However, we should not fail to consider that the phenomenon of informal constitutional change, and in particular silent constitutional change, also teaches us something about the nature of law itself—namely that law may not only shape the evolution of institutional reality, but that, in its turn, the evolution of reality may also shape and reshape the meaning of legal rules. Indeed, it confronts us with the fact that law and reality have an interdependent relationship, and hence that the capability of constitutional precepts to control the distribution and exercise of power within a state is limited.⁹⁴ This also reminds us that no constitution can preclude that the operation of its provisions changes as a consequence of developments that lay beyond the control of its constitutional actors.⁹⁵

93. *Id.* at 740.

94. Though not necessarily absent, as Jellinek concluded. See JELLINEK, *supra* note 31, at 32.

95. See Brun-Otto Bryde, *Änderung des Grundgesetzes*, in GRUNDGESETZ-KOMMENTAR (Boysen et al. eds., 2012).